Supreme Court, U.S.
FILED
NOV 12 2015
OFFICE OF THE CLERK

No. 14-1095

In The
Supreme Court of the United States

MICHAEL MUSACCHIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

JOE KENDALL
JODY RUDMAN
THE KENDALL LAW GROUP
3232 McKinney Avenue
Dallas, TX 75204
(214) 744-3000
jkendall@kendalllawgroup.com

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, NW
Washington, D.C. 20008
(202) 237-8165
jaffe@esjpc.com

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Argument 1

I. Sufficiency of the Evidence for a Conviction Must Be Measured Against the Elements of a Crime as Instructed to the Jury without Government Objection. 2

A. Applying the Elements as Instructed to the Jury Is the Only Means of Serving the Interests of the Law-of-the-Case Doctrine and of Sufficiency Review 4

B. The "Plainness" of Error in a Jury-Instruction Does Not Support a Law-of-the-Case Exception. 8

II. A Statute-of-Limitations Bar Not Raised at or Before Trial Is Reviewable on Appeal 14

A. As a Substantive Constraint on Government, the Limitations Bar in § 3282(a) Should Be Non-Waivable or Require a Knowing and Voluntary Waiver. 15

B. At a Minimum, Plain-Error Review Is Available for Forfeited Statute-of-Limitations Bars. 18

C. The Statute of Limitations Is a Jurisdictional Constraint on the Power of the Courts and the Executive Branch 19

Conclusion 23

TABLE OF AUTHORITIES

Cases

Agostini v. Felton, 521 U.S. 203 (1997) 12

Alleyne v. United States, -- U.S. --, 133 S. Ct. 2151 (2013) 5

Apprendi v. New Jersey, 530 U.S. 466 (2000) 5

Arizona v. California, 460 U.S. 605 (1983) 12

Biddinger v. Commissioner of Police, 245 U.S. 128 (1917) 19

Bowles v. Russell, 551 U.S. 205 (2007) 20

Boyle v. United Techs. Corp., 487 U.S. 500 (1988) 7

Burks v. United States, 437 U.S. 1 (1978) 7

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) 7

Day v. McDonough, 547 U.S. 198 (2006) 15, 16, 19

Giordenello v. United States, 357 U.S. 480 (1958) 8

Greenlaw v. United States, 554 U.S. 237 (2008) 7

Jackson v. Virginia, 443 U.S. 307 (1979) 4

Johnson v. United States, 520 U.S. 461 (1997) 9, 10

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 5

Nguyen v. United States, 539 U.S. 69 (2003) 15

Pepper v. United States, 562 U.S. 476 (2011) 12

Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010) 22

Sebelius v. Auburn Reg'l Med. Ctr., -- U.S. --, 133 S. Ct. 817 (2013) 21

Smith v. United States, -- U.S. --, 133 S. Ct. 714 (2013) 19, 20, 21

Spaziano v. Florida, 468 U.S. 447 (1984) 22, 23

United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc., 508 U.S. 439 (1993) 9

United States v. Baldwin, 414 F.3d 791 (7th Cir. 2005), *overruled on other grounds by United States v. Parker*, 508 F.3d 434 (7th Cir. 2007) 18

United States v. Cook, 84 U.S. (17 Wall.) 168 (1872) 19, 20

United States v. Cotton, 535 U.S. 625 (2002) 10, 18

United States v. Franco-Santiago, 681 F.3d 1 (1st Cir. 2012) 18

United States v. Jackson, 207 F.3d 910 (7th Cir.), *vacated on other grounds*, 531 U.S. 953 (2000) 9

United States v. Olano, 507 U.S. 725 (1993) 9, 10, 18

United States v. Powell, 469 U.S. 57 (1984) 6

United States v. Wells, 519 U.S. 482 (1997) 11

United States v. Wong, -- U.S. --, 135 S. Ct. 1625 (2015) 21

Whalen v. United States, 445 U.S. 684 (1980) 5

Wood v. Milyard, -- U.S. --, 132 S. Ct. 1826 (2012) 15

Statutes

18 U.S.C. § 3282(a) ..... passim

Rules

FED. R. CIV. P. 50 7

FED. R. CRIM. P. 12(b)(3) 22

FED. R. CRIM. P. 29 7

In The
Supreme Court of the United States

No. 14-1095

MICHAEL MUSACCHIO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

ARGUMENT

Misapplying civil standards to this criminal-law application of law of the case, the Government ignores the role of the jury, the broad consequences of the district court having instructed it on particular elements, and the Government having obtained a verdict on those elements that is not supported by sufficient evidence. It is the jury that is the focus here, not some narrower alternative theory that could have been, but was not, presented as the framework

for conviction. Where the Government has not objected and the jury deliberates on particular elements, required or not, its verdict must be measured against those elements.

As for review of an inadvertently forfeited limitations bar, both sides agree that review is inevitable – at latest in a habeas proceeding claiming ineffective assistance of counsel. Waiting for that last opportunity makes no sense and multiple theories of review support allowing a limitations bar to be raised on direct appeal.

I. Sufficiency of the Evidence for a Conviction Must Be Measured Against the Elements of a Crime as Instructed to the Jury without Government Objection.

Where the Government acquiesces to the jury deliberating under instructions including a particular theory and elements, the jury's resulting verdict of conviction must be tested on the elements as instructed in order to determine whether there was sufficient evidence for the jury *rationally* to reach that verdict. If there was not sufficient evidence, there necessarily was a problem with the jury, the instructions, or both. Whether the instructions went beyond the statutory minimum elements is irrelevant to the interests served and the conclusions drawn from sufficiency review and is irrelevant to the other interests served by the law-of-the-case doctrine in this context.

Although the conjunctive elements of the jury instruction in this case went beyond the disjunctive terms of the statute, such instruction was hardly unforeseeable or arbitrary. The Government pursued

this case as involving a conspiracy *both* to access a computer "without authorization" *and* to "exceed authorized access." The Superseding Indictments continued to allege, though not charge, conspiracy for both types of access, and the Government's arguments and witnesses erroneously sought, though failed, to establish the "exceeding" element. Pet. Br. 6-10, 29-30. The issue so permeated the case that the Government itself noted post-trial that Petitioner "does not understand" that the formal conspiracy charge had abandoned the "exceeding" claim (if not the allegations). Gov't Opp. to Def. Supp. Motion for Judgment of Acquittal, Aug. 30, 2013, at 2 [Doc. 203, PageID 1219].

Contrary to the Government's claims, U.S. Br. 6 n. 2, the conjunctive instruction was neither an inexplicable clerical error nor a windfall to Petitioner. Rather, it was the natural, if erroneous, result of the manner in which the Government tried this case. Indeed, the instruction is an almost verbatim recitation of the allegations in the Second Superseding Indictment.[1]

Having gotten the benefit of painting with the broad brush of the combined crimes – piling on, as it were – the Government now seeks to be excused from needing sufficient evidence for the theory as presented to the jury because, it claims, such allegations, arguments, and witnesses were superfluous. But it is impossible to demonstrate they were superfluous to

---

[1] *Compare* JA 168 (Jury Charge), *with* JA 92-93 (Second Superseding Indictment: object, manner, and means of the conspiracy).

the *jury*, and it is impossible to demonstrate that simply ignoring the added "exceeding" element, and the lack of sufficient evidence for it, is harmless beyond a reasonable doubt.

A. Applying the Elements as Instructed to the Jury Is the Only Means of Serving the Interests of the Law-of-the-Case Doctrine and of Sufficiency Review.

The various interests supporting the law-of-the-case doctrine at issue here, Pet. Br. 21-22, 32-35, only work if the baseline for sufficiency of the evidence is what the jury was actually instructed to do. Measuring sufficiency *exclusively* against the elements in the statute regardless what the jury was told, as the Government would do, makes the entire exercise and the jury's involvement rather pointless. Although criminal statutes certainly establish the minimum elements *necessary* for a conviction – and law of the case cannot reduce such elements – they do not define the maximum or *sufficient* elements for a particular conviction, which might change based on the Government's action or inaction in the case. Indeed, every circuit court to consider the issue agrees with the general proposition that the Government's conduct *can* increase the burdens it must meet in order to convict a defendant. Pet. Br. 20-24.

None of the cases cited by the Government, at 14-15, says otherwise. *Jackson v. Virginia*, 443 U.S. 307, 314-15 (1979), discusses sufficiency review in terms of the elements of the offense or crime "charged," rather than merely the elements set forth

in the statute.[2] Indeed, the discussion in *Jackson* focuses on whether the jury could have rationally reached the result it did or whether it may have failed to apply the proper constitutional standard of proof beyond a reasonable doubt. Those inquiries turn on what the jury was in fact asked to do, not on some lesser instruction that it might otherwise have been given. Regardless whether the "exceeding" element was required by statute, if the jury found such element without sufficient evidence, that reflects the exact same problems in applying the reasonable doubt standard that insufficient evidence for any other element would suggest. The necessary conclusion from such a result is that the jury was confused, irrational, or acted improperly. Ignoring that conclusion because the element was not required at the outset only sweeps the due process concerns under the rug. While sufficiency review does not inquire into the *ac-*

---

[2] *Whalen v. United States*, 445 U.S. 684, 689 (1980), states the truism that courts may not impose punishments not authorized by Congress because to do so would, *inter alia*, trench "particularly harshly on individual liberty." That confirms that a statute sets the *minimum* elements necessary for conviction, but says nothing about whether government conduct can raise the bar further. *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986), likewise does not state that charged elements not required by statute can be ignored. The issue in *McMillan* was whether the Government was *required* to include as additional elements facts that increase the severity of punishment. This Court held that it was not so required, though that conclusion was limited by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and later overruled by *Alleyne v. United States*, -- U.S. --, 133 S. Ct. 2151, 2163-63 (2013). In any event, the case said nothing about the consequences of instructing the jury on elements beyond the minimum required.

tual reasoning of the jury, such review nonetheless represents a safety net to ensure the outcome is at least possible.

The Government's reliance, at 15, on *United States v. Powell*, 469 U.S. 57, 61-69 (1984), is particularly misplaced. The jury in *Powell* convicted on one count and acquitted on another, yet the conviction was predicated on the same conduct for which the defendant was acquitted in the second count. This Court nonetheless upheld the conviction despite the seeming inconsistency because they were separate counts and the disparate results could have been a product of leniency or mercy on the second count rather than confusion or impropriety. Here, by contrast, the jury convicted based on an unsupported element within a single conspiracy count, a result that cannot be explained away as an act of leniency. Rather, the jury was either confused or failed to properly apply the presumption of innocence and the beyond-a-reasonable-doubt standard. A jury ignoring instructions in order to be merciful presents no due process concern; one ignoring or misapplying them to convict poses precisely the type of due process concern supporting sufficiency review regardless whether, unbeknownst to the jury, an instructed element was not necessarily required by the statute.[3]

---

[3] Ensuring "notice and a meaningful opportunity to defend," U.S. Br. 14, likewise is best served by looking to the elements actually given in the jury instructions. At a minimum, the inclusion of the "exceeding" issue in the case and instructions diverted significant defense time and attention. For the Government to repudiate accountability for such issue after the jury has considered it is a bait and switch that offends the values of both notice and a meaningful opportunity to defend.

The Government claims, at 16-17, 21-22, that it may defend a judgment of conviction on any alternative ground and is not stuck with the theory presented to the jury. That position ignores the non-usurpable role of the jury in determining guilt in criminal cases. Unlike in civil cases or sentencing issues, a court may *not* enter summary judgment or a directed verdict in favor of the prosecution. Only a defendant may obtain a court-directed judgment of acquittal. *Cf. Burks v. United States*, 437 U.S. 1, 16 (1978) (Government's case so lacking that court should have directed an acquittal). While sufficient evidence of all statutory elements is a *necessary* condition to uphold a conviction, it is not a *sufficient* condition such that a court could preemptively adjudicate a defendant's guilt. Civil or sentencing cases thus are inapposite. *See, e.g., Boyle v. United Techs. Corp.*, 487 U.S. 500, 513 (1988) (where no liability as a matter of law under new theory, no need for a remand; erroneous jury instructions cannot create liability where none is authorized); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988) (O'Connor, J., plurality opinion) (issue was preserved by motions for summary judgment and JNOV, failure to separately raise same objection to jury instructions does not bar review of motions for judgment); *compare* FED. R. CIV P. 50 (either party may seek judgment as a matter of law), *with* FED. R. CRIM. P. 29 (only defendant may seek judgment).[4]

---

[4] *See also Greenlaw v. United States*, 554 U.S. 237, 249-50 (2008) (sentencing determined by the judge may be challenged or defended by either party); *Giordenello v. United States*, 357 U.S. 480, 487-488 (1958) (declining to rule on alternative ground

B. The "Plainness" of Error in a Jury-Instruction Does Not Support a Law-of-the-Case Exception.

The Government does not meaningfully dispute that the plain-error exception applied by the Fifth and First Circuits makes no sense when compared to the uniformly accepted general rule regarding extra-statutory elements in an indictment or the inclusion in the instructions of added elements that are not *plainly* erroneous. Pet. Br. 24-32.

Instead it merely reiterates earlier arguments, already addressed, suggesting that an instructional error should not be perpetuated at the sufficiency stage, and draws incorrect analogies to civil cases and alternative grounds to affirm. U.S. Br. at 20-22. The Government's related claim, at 22-23 that there can be no estoppel in determining the correct rule of law again misses the point that the Government as prosecutor stands in a different position from civil litigants or criminal defendants. Indeed, the Government effectively estops itself from relying on certain legal theories in criminal cases whenever it fails to indict on a particular charge or theory. This situation is no different – whether the Government *could have* argued a more favorable theory of criminal culpability to the jury, it painted this case with a broader brush and did not object when the instructions simply followed what it had been doing all along.[5]

---

defending improperly seized and admitted evidence but allowing such argument to be raised on retrial).

[5] The civil cases cited by the Government, at 22-23, do not say otherwise. *See, e.g., United States Nat'l Bank of Or. v. Inde-*

The Government, at 23-24, next renews its argument that Rule 52(b) plain-error review is available to allow it and the courts to ignore the instruction given below. Plain-error review is not available to the Government in the circumstances here. Pet. Br. 27-32. Furthermore, allowing the novel expansion of Rule 52(b) suggested by the Government would run counter to this Court's recognition of the circumscribed nature of the rule. *Johnson v. United States*, 520 U.S. 461, 466 (1997); *United States v. Olano*, 507 U.S. 725, 731-35 (1993).[6] At most the government might invoke harmless error under Rule 52(a), but the standards are more stringent and there is no prospect that the Government could satisfy those standards here. Indeed, *Olano*, 507 U.S. at 741; *id.* at 741-

---

pendent Ins. Agents of Am., Inc., 508 U.S. 439, 447 (1993) (holding that court not required to issue an advisory opinion based on a hypothetical agreed to by the parties).

[6] The circuit case the Government cites, at 24, for application of plain-error review in favor of the Government is easily distinguished. The discussion of Rule 52(b) in *United States v. Jackson*, 207 F.3d 910, 917 (7th Cir.) (Posner, J.), *vacated on other grounds*, 531 U.S. 953 (2000), is *dicta* multiple times over, as plain error was never argued by the Government and the claimed error was neither plain nor even error. Furthermore, the case involved the admissibility of evidence, which is a question for the court, and hence correcting an erroneous theory of admissibility if there were some other basis to admit the same evidence would have no bearing on the jury's deliberations. Admissibility is a purely procedural question and review in such circumstances is not for plain error, but rather for harmless error or, indeed, no error at all. The additional circuit cases *Jackson* cites as applying plain-error review for the Government all involve sentencing issues, which again are matters for the court, can be determined as a matter of law, and do not bear upon the jury's deliberations or determination of guilt.

42 (Kennedy, J., concurring), amply illustrates the significant impact of the burden under harmless error analysis.[7]

As for the interests of justice, allowing the Government to save the result of a verdict no rational jury could have reached consistent with its instructions would undermine, not enhance, the fairness, integrity, and public reputation of the courts by appearing results-oriented and dismissive of the role of the jury. The cases cited by the Government do not hold that reversing a conviction would constitute a miscarriage of justice for purposes of Rule 52(b). In both *Johnson v. United States*, 520 U.S. at 469-70, and *United States v. Cotton*, 535 U.S. 625, 634 (2002), this Court addressed whether defendants, not the Government, had satisfied the plain-error test. This Court in both cases concluded that defendants had not because the errors were harmless and hence did not create a miscarriage of justice. As an aside, this Court observed, in *dicta*, that reversing a conviction or substantially lowering a mandatory minimum sentence based on a harmless error would likely encourage abuse and provoke public ridicule.

Such *dicta* falls far short of a holding that enforcing against the Government the consequences of its choices would constitute a miscarriage of justice. The jury in this case reached a verdict that could not be supported by the instructions and evidence it was given. And the Government's hands are far from

---

[7] Also, problems with the application of the reasonable-doubt standard would not be deemed harmless in any event. *Jackson v. Virginia*, 443 U.S. at 320 n. 14.

clean given that the instruction now causing it problems echoed its own indictment and arguments regarding a conspiracy aimed at both forms of access. There is nothing unjust about entering an acquittal when the Government was incapable of proving the conjunctive crime it alleged, the conjunctive crime it tried, and the conjunctive crime as instructed to the jury without objection. That it could have, and perhaps should have, done a better job settling on a narrow theory and sticking to it, rather than continuing to try the case under a theory it ultimately could not support, does not make the failure of its case "unjust"; it makes it appropriate.

Contrary to the Government's suggestion, at 25-26, the outcome of this case was far from inevitable absent the extra element, and the Government certainly could not meet its burden to demonstrate harmlessness beyond a reasonable doubt. The Government reaped substantial benefits from its decision to litigate this case as involving both forms of access, rather than limiting the purported conspiracy to the narrower access "without authorization." With the burden of proving harmlessness beyond a reasonable doubt on the Government, the best that can be said is that there is uncertainty regarding what the jury did and what the jury would have done under a different instruction. While such uncertainty may defeat a claim of prejudice when the burden is on Petitioner, it equally defeats a claim of harmlessness when the burden is on the Government. Pet. Br. 28-31.

The Government's renewed citation, at 27, to *United States v. Wells*, 519 U.S. 482, 487-89 (1997), to claim that the law-of-the-case doctrine is a discre-

tionary matter within the circuits continues to be misguided. *See* Pet. Br. 19-20 n. 2 (discussing *Wells*). *Wells* rejected a previously unraised law-of-the-case argument as insufficient to oust this Court's own authority to decide an issue raised and decided below, and preserved without objection in the Petition. That result had more to do with the procedural posture of the case and the last minute attempt to torpedo a question properly granted by this Court. *Wells* does not represent a general comment on whether the law-of-the-case doctrine can bind the Government when properly raised and argued.[8]

Turning to the narrow question actually presented in the Petition – whether the plain-error exception to the otherwise generally accepted law-of-the-case rule makes any sense – the Government, at 29-30, offers little substantive defense of that exception. It does not dispute the widespread acceptance of the general rule; it does not dispute that errors in jury instructions have as much or more claim to the rule as errors in the indictment; and it does not dispute that the failure to object to a "plain" error should be held against it more than failure to object to a debatable error. Furthermore, the Government eventually admits, at 31, that it may well acquiesce in instructions that increase its burdens when it finds that tactic useful. Such admission, however, is difficult to reconcile with the Government's other arguments here,

---

[8] The Government's citation, at 12, 26, 28, to *Agostini v. Felton*, 521 U.S. 203 (1997), *Pepper v. United States*, 562 U.S. 476 (2011), and *Arizona v. California*, 460 U.S. 605 (1983), adds nothing to its argument and ignores the discussion of those cases in Petitioner's opening brief, at 25-26.

and hence it is hard to imagine why it should be permitted to revoke such acquiescence now where the result is not to its liking.[9]

Petitioner seeks to enforce the burden to which the Government acquiesced and which the jury wrongly found was satisfied. The jury should have acquitted on the conspiracy count on this record and the instructions it was given, yet did not do so. The conviction not supported by sufficient evidence was a windfall to the Government, not Petitioner. The Government should not now get the further benefit of a reduced baseline for sufficiency review. The proper course is to evaluate the evidence according to the instructions given and, if insufficient to support the verdict, to acquit on the conspiracy charge, as the jury itself should have done. Merely ordering a new trial, as the Government suggests, would give it a second bite at the apple, would reward it for a problem partly of its own making, and would be contrary to basic principles of double jeopardy. If the Government cannot turn square corners when seeking to take away the liberty of its citizens, then it should be required to live with the natural consequences of such failures.

---

[9] The Government, at 32 n. 13, seeks to lay the lack of objection to the instructions at Petitioner's feet, arguing that his counsel could have objected to the introduction of the "exceeding" issue at trial. But the Government itself noted below that trial counsel was also misled. *Supra* at 3. And trial counsel is not responsible for saving the Government from the consequences of its tactical decisions. Here Petitioner merely argues the Government must take the bad with the good. It was able to introduce the exceeding issue, but now its conviction must be judged according to the instruction as given on that issue.

II. A Statute-of-Limitations Bar Not Raised at or Before Trial Is Reviewable on Appeal.

Both sides agree that review of a forfeited statute-of-limitations bar is inevitable; the only question is how much time will pass before a court actually hears the issue. As the Government correctly concedes, if not raised now, the limitations issue will form the basis for an ineffective assistance challenge. U.S. Br. at 34, 53; *see* Pet. Br. 56-57.

Given such inevitable review, the entire doctrinal justification for the waiver rule in the Fifth Circuit and elsewhere vanishes. A waiver that violates an attorney's duty of care – and hence a defendant's right to counsel – cannot possibly be deemed effective. Ample reasons favor addressing the issue sooner rather than later, there is no reason why delay would be valuable, and the Government's concern with having a fair opportunity to respond can be addressed in far more sensible ways.

The baseline question for this Court is whether a limitations bar can waived by mere inadvertence. Pet. Br. 38. If the answer is "no," the decision below must be vacated and remanded for consideration of the merits of the limitations bar. Multiple theories support that conclusion, and it matters not to this case whether the Court adopts the narrow plain-error approach, the broad jurisdictional approach, or one of the middle approaches – requiring either an affirmative waiver or concluding that the congressional policy choice may not be rejected by the parties, even if not jurisdictional. Each approach leads to the same result here.

Given that the Government barely responds to the middle approaches, Petitioner will start with those.

A. As a Substantive Constraint on Government, the Limitations Bar in § 3282(a) Should Be Non-Waivable or Require a Knowing and Voluntary Waiver.

As Petitioner has noted, the limitations bar contained in 18 U.S.C. § 3282(a) embodies a substantive congressional restriction on government and an important substantive right for defendants that either cannot be waived at all or can only be waived intentionally. Pet. Br. 39-40, 46-48, 49-53.

This Court's decision in *Nguyen v. United States*, 539 U.S. 69, 80 (2003), supports the non-waivable approach and its decisions in *Wood v. Milyard*, -- U.S. --, 132 S. Ct. 1826 (2012), and *Day v. McDonough*, 547 U.S. 198 (2006), support the intentional waiver approach. The Government offers no credible response to either.

The Government has no response to this Court's non-waivability analysis in *Nguyen*. Indeed, it actually cites *Nguyen*, at 52, for the proposition that courts may not create exceptions to congressional commands. Petitioner agrees – which means there can be no implied or court-made exception to the express command of the limitations bar in § 3282(a).

Regarding the intentional-waiver analysis in *Wood* and *Day*, the Government minimally argues that the limitations period for habeas is a "threshold constraint" on habeas petitioners. U.S. Br. at 51-52. But exactly the same is true of the limitations bar in

§ 3282(a). Indeed, while the limitations period for habeas proceedings is *expressly* made an affirmative defense by the rules and the burden is squarely on the State to raise it at the outset, the same is not true of limitations arguments raised against criminal prosecutions. Pet. Br. 50-51. On every measure, the case supporting an inadvertent waiver is stronger in the habeas context than it is here, yet this Court refused to adopt that approach. *Id.*[10]

Regarding the need for an actual waiver to be knowing and intentional, the Government, at 47, only quibbles with what constitutes a valid intentional waiver. It is irrelevant to this case whether a waiver must be made by trial counsel, by defendant himself, by allocution, or by implication from other intentional conduct such as pleading guilty. There is no dispute that Petitioner and his counsel did none of those things. There was inadvertence, nothing more.

The Government's repeated concern, at 48-50, that it have an opportunity to introduce evidence if necessary to rebut a limitations bar is an question of remedy and procedure, not of whether the bar can be

---

[10] The Government's invocation, at 52, of federal-state comity as distinguishing *Wood* and *Day* is curious given that for the vast majority of our history there was *no* limitations period for habeas petitions. Pet. Br. 51. In any event, a defendant's interest in invoking the Great Writ and the law's long-standing solicitude towards persons charged with crimes at least rivals and generally outweighs such comity concerns. Indeed, the Government's own observation, at 52, that *Day* would preclude late assertion of a limitations bar if it prejudiced the habeas petitioner makes clear that the prisoner's rights take precedence over concerns for comity. 547 U.S. at 210-11.

raised at all. In most instances the indictment or the existing record will be sufficient to resolve the issue.

In this case, the substance of the limitations issue is not yet presented, only the reviewability of that issue *vel non*, and the merits of the limitations bar can be addressed in the first instance on remand. Cert. Reply 10-11. If the Government can show the need for introducing new evidence to properly respond to the issue, it can ask for that opportunity and certainly should receive it.[11] As with any number of forfeited issues that may be raised on appeal – including questions of jurisdictional amount and citizenship – any need to accommodate additional evidence is well within the procedural competence of the courts. Such remedies amply address the Government's concern with having a fair opportunity to demonstrate compliance.

In any event, those same concerns are inevitable in the context of an ineffective-assistance-of-counsel claim. The only difference is the issue will have grown more attenuated, the court hearing the habeas petition will be less familiar with the case, and a defendant may have spent years in prison contrary to congressional command.

---

[11] Even if there is some factual component to the limitations claim that should have been presented to the jury, the cleaner answer would be to find that Petitioner only waived his right to a jury determination of the issue, rather than waived the issue entirely. Any required factual issues thus could be remanded to the trial court for determination. Such court, having heard the other evidence at trial, would be in a better position to resolve any further issues than would be a habeas court years later.

B. At a Minimum, Plain-Error Review Is Available for Forfeited Statute-of-Limitations Bars.

The Government argues that because it has no duty to plead compliance with the statute of limitations, there is no error when the defendant fails to raise it. But Rule 52(b) includes "defects" within its category of reviewable plain errors. At a minimum, non-compliance with an affirmative congressional prohibition against time-barred prosecution, trial, and punishment constitutes a "defect" regardless who bears the initial burden of raising it.

Olano rejected a comparable theory claiming no error absent a required objection. 507 U.S. at 733-34. Indeed, the rule *only* applies where an argument was thus forfeited. That plain-error review applies even to rulings correct under controlling precedent when made, but rendered erroneous by intervening law, *United States v. Cotton*, 535 U.S. at 632, demonstrates that the Government's theory of error is mistaken. Here, non-compliance with an express congressional prohibition on time-barred conduct by prosecutors and the court is a plain error. *See United States v. Franco-Santiago*, 681 F.3d 1, 13 (1st Cir. 2012); *United States v. Baldwin*, 414 F.3d 791, 795 & n.2 (7th Cir. 2005), *overruled on other grounds by United States v. Parker*, 508 F.3d 434 (7th Cir. 2007).

That a court should not raise affirmative defenses that were knowingly and intentionally abandoned, U.S. Br. 44, does not answer whether an inadvertent potential forfeiture should be ignored by a court. The lower court in *Day*, for example, raised the limitations bar *sua sponte*, 547 U.S. at 201, and the better

practice might encourage trial courts to inquire into any prospective limitations issues in order to preempt time-consuming problems down the line. Pet. Br. 57.

As for the Government's argument, at 44-45, that violation of the limitations period can never be "plain" given the potential for rebuttal, that view gets the issue backwards. Here, the Superseding Indictments on their faces are outside the 5-year window and, once the issue has been raised, it is the Government's burden to establish compliance with the limitations period. That the Government might eventually meet its burden and save its Superseding Indictment does not make the facial violation any less plain.

C. The Statute of Limitations Is a Jurisdictional Constraint on the Power of the Courts and the Executive Branch.

The Government, at 34-38, reiterates its argument that the limitations bar is an affirmative defense, not a jurisdictional constraint, citing *United States v. Cook*, 84 U.S. (17 Wall.) 168 (1872), *Biddinger v. Commissioner of Police*, 245 U.S. 128 (1917), and *Smith v. United States*, -- U.S. --, 133 S. Ct. 714, 719-20 (2013). Those cases, however, addressed pleading and proof issues, and did not analyze whether § 3282(a) was jurisdictional. They cannot be viewed as resolving that issue *sub silentio* without regard to more recent jurisprudence on jurisdiction.

As noted in Petitioner's opening brief, *Cook* concerned archaic formalities of pleading that no longer have relevance in federal court. Pet. Br. 45-46. The primary concern in *Cook* was whether the Govern-

ment would have an opportunity to respond to a limitations claim with evidence, if necessary, not whether it was jurisdictional. Modern rules can provide such an opportunity, and hence *Cook* is no more than a vestige of a bygone era of complicated formalities.[12] Indeed, the same concern regarding an opportunity to introduce evidence can arise as to other jurisdictional questions – amount in controversy; citizenship – yet do not negate their jurisdictional nature.

The Government also notes, at 37, that the defendant in *Cook* argued that where an indictment does not on its face embody a charge of a crime the court lacks "jurisdiction" and that such defect in the indictment can be raised at any time. 84 U.S. (17 Wall.) at 170-71. That characterization of failure to state a claim as being a jurisdictional problem was not echoed by this Court, and is a good example of this Court's more modern recognition of the previously sloppy use of the term "jurisdiction." *See Bowles v. Russell*, 551 U.S. 205, 210 (2007); *id.* at 215-16 (Souter, J., dissenting) (noting efforts to clean up previously less than meticulous use of the term "jurisdiction"). Neither the holding of *Cook*, nor the loose use of the word "jurisdiction" by an advocate in that case resolves whether § 3282(a) is jurisdictional.

The Government fares no better with its citation to *Smith*, -- U.S. at --, 133 S. Ct. at 719-20. The observation that the limitations period is not an "element"

---

[12] That *Cook* characterized the limitations bar as a " 'matter of defence' to be established by the defendant," U.S. Br. 35 (quoting *Cook*), confirms it as an anachronism. The Government concedes a defendant only bears the burden of raising, not establishing, a limitations bar.

of an offense is irrelevant to whether it is a jurisdictional restriction. The discussion in *Smith* involved who bore the burden of arguing *withdrawal* from a conspiracy outside the limitations period. This Court observed that the burden was on the defendant, though noted that the burden of proof, if not the burden of pleading, for ordinary limitations issues was on the Government. *Id.* at 721. That *Smith* cited *Cook* and *Biddinger* for their pleading holdings does not convert them into jurisdictional rulings.

Ultimately, categorizing the limitations bar as an affirmative defense for pleading purposes begs the question whether it is also a non-waivable jurisdictional limit. The concerns driving pleading rules are not identical to the considerations driving the jurisdictional analysis. Congress in § 3282(a) expressly articulated a constraint on the power of the courts and the executive branch. There is nothing inconsistent in not requiring the Government to specifically plead compliance yet addressing the issue of court authority whenever it may be raised.

Regarding this Court's modern cases, the Government, at 38-39, does not even cite *Bowles*, much less distinguish it. Instead it cites cases involving very different civil statutes that are readily distinguished. *See Sebelius v. Auburn Reg'l Med. Ctr.*, -- U.S. --, 133 S. Ct. 817, 824-25 (2013) (time period for administrative appeal regarding health-care reimbursement; permissive language distinguished from mandatory language in *Bowles*); *United States v. Wong*, -- U.S. --, 135 S. Ct. 1625, 1632 (2015) (allowing equitable tolling of time limits for civil claims under the FTCA where statute's text, unlike here, "speaks only to a

claim's timeliness, not to a court's power"); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010) (requirement that copyright holders register their works before they can sue for copyright infringement not a limitation on federal court jurisdiction, merely a precondition to plaintiff's right to sue). The far better example is *Bowles* itself, which involved a statute less clearly addressing the power of the courts than does the limitations bar in § 3282(a). Pet. Br. 41-43.

Regarding the language of the § 3282(a), the Government notes that the Grand Jury Clause prohibits holding a person "to answer" for serious crime absent presentment or indictment of a grand jury, yet is deemed waivable. But such matters are waivable because they present defects in the indictment that specifically "must" be raised by pretrial motion under FED. R. CRIM. P. 12(b)(3), failure to do so without good cause being deemed a waiver. Congress is entitled to make that choice regardless of the wording of the constitutional provision. But it has *not* made such a choice regarding statute-of-limitations bars, which are *not* included in the required motions under Rule 12(b)(3). Pet. Br. 50-52.

The Government's discussion of *Spaziano v. Florida*, 468 U.S. 447, 454-57 (1984), regarding the right to instructions on a lesser-included offense in a capital case if defendant waives any limitations bar reads too much into that case. The *state* limitations statute in that case had no bearing on this Court's jurisdiction, was not claimed to have ousted the state court's jurisdiction, and hence has nothing to do with the issues in this case. Furthermore, that this was a death penalty case tends to undermine any broader conclu-

sions that might be drawn from it. 468 U.S. at 456. The understandable reluctance to allow the State to leverage a death penalty verdict by making the case all or nothing would overshadow any lurking jurisdictional issues not raised by the parties. The case surely cannot be read as a holding on the jurisdictional issue, merely a result that might have been different had the case involved federal crimes tried in federal court.[13]

* * * *

In the end, this Court need only decide the question presented whether review on direct appeal is available for inadvertently forfeited limitations bars. Because courts will have to address such forfeited issues eventually, it would be best to do so sooner rather than later. Whether this Court chooses a narrow or a broad rationale, it should answer the question presented in favor of review on appeal.

CONCLUSION

For the reasons above, this Court should reverse the decision of the court of appeals and remand for further proceedings.

---

[13] The Government's pre-1944 circuit cases rejecting plain error review of forfeited limitations bars, U.S. Br. at 48 & n. 22, are as irrelevant to this Court's task as are the cases on the Government's side of the split. The whole point here is that the circuits disagree. Merely citing older cases from the same circuits that disagree now (or worse still, rejected law from the Seventh Circuit, which now allows such review) does not indicate what the answer should be, it merely reiterates the conflict.

Respectfully submitted,

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

JOE KENDALL
JODY RUDMAN
THE KENDALL LAW GROUP
3232 McKinney Avenue
Dallas, TX 75204
(214) 744-3000

Counsel for Petitioner

Dated: November 12, 2015